STATE OF MICHIGAN

COURT OF APPEALS

GJUSTA DEDIVANAJ, Plaintiff-Appellant,	UNPUBLISHED June 21, 2007
v	No. 266769 Wayne Circuit Court
DAIMLERCHRYSLER CORPORATION, Defendant-Appellee.	LC No. 02-236947-CZ

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

Plaintiff appeals the trial court's grant of DaimlerChrysler's motion in limine and motion for directed verdict on her claims of sexual harassment and race association discrimination. For the reasons set forth in this opinion, we affirm.

I. Limitations Period

When plaintiff first applied for employment at DaimlerChrysler in 1995, she signed an employment application that contained the following provision:

> I agree that any claim or lawsuit relating to my service with Chrysler Corporation or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary.

Plaintiff argues that the trial court should not have enforced the provision and, instead, should have allowed her to present evidence of sexual harassment and race association discrimination outside the limitations period.[1]

[1] This Court reviews de novo the legal question of whether a statute of limitations bars a cause of action. *Colbert v Conybeare Law Office*, 239 Mich App 608, 613-614; 609 NW2d 208 (2000). This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Chmielewski v Xernmac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

In its motion in limine, DaimlerChrysler argued that the limitations period is valid and enforceable and asked the trial court to exclude evidence outside the six-month period. Because plaintiff filed her complaint on October 17, 2002, DaimlerChrysler argued that the cut off date for her claims should be April 17, 2002.

The outcome of this issue is controlled by this Court's decision in *Clark v DaimlerChrysler*, 268 Mich App 138; 706 NW2d 471 (2005). The plaintiff in *Clark* raised the same arguments about precisely the same employment application provision, and this Court rejected each argument. The Court ruled that, because the language in the employment application is not ambiguous, the term must be enforced "as written unless it is contrary to law or public policy, or is otherwise unenforceable under recognized traditional contract defenses," including duress, waiver, estoppel, fraud, or unconscionability. *Id*. at 142.

Here, as in *Clark*, the plain language of the provision states that an employee must file any claim or lawsuit within six months of the action giving rise to the claim. While plaintiff asserts that the term "claim" is ambiguous, DaimlerChrysler is correct that, regardless whether it may apply to other internal complaints, plaintiff was, at the very least, required to file her *lawsuit* within six months of when the alleged wrong occurred. Because she filed her complaint on October 17, 2002, her cut-off date was April 17, 2002 and any actions that arose prior to that date are untimely under the plain language of the agreement.[2] Accordingly, the trial court correctly ruled that the six month limitations period is valid and enforceable.

II. Continuing Violations Doctrine

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[2] In *Clark*, this Court also held that the same limitations provision is not contrary to public policy. The Court explained:

> Michigan has no general policy or statutory enactment prohibiting the contractual modification of the periods of limitations provided by statute. *Rory, supra* at 471. Likewise, even before *Rory*, provisions within an employment contract providing for a shortened period of limitations were held to be reasonable and, therefore, valid and enforceable. See *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 240-244; 625 NW2d 101 (2001). Consequently, we are unable to conclude that the limitations period provided in the contract violates public policy.

Like plaintiff here, the plaintiff in *Clark* argued that the employment application is an adhesion contract. Once again, the Court in *Clark* rejected this argument and opined that, pursuant to *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), this Court "may not consider whether the contract was one of adhesion when determining whether the modified period of limitations was unconscionable." *Clark, supra* at 143. Further, as in *Clark*, plaintiff failed to present any evidence that she had no realistic alternative to employment with DaimlerChrysler. *Clark, supra* at 143-144. Moreover, the *Clark* Court concluded that the six month limitations period is not inherently unreasonable and it does not shock the conscience. *Id.*

Plaintiff further claims that the trial court erred when it refused to apply the continuing violations doctrine to allow the jury to consider claims that fell outside the limitations period.

Plaintiff incorrectly claims that the trial court waited until plaintiff presented four days of evidence at trial to apply the holding in *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 284-285; 696 NW2d 646, amended 473 Mich 1205 (2005), in which our Supreme Court abrogated the continuing violations doctrine. Indeed, plaintiff claims that she would have presented different evidence if the trial court had ruled on the continuing violations doctrine before trial. At the motion in limine hearing on September 23, 2005, DaimlerChrysler's counsel specifically argued that the Court in *Garg* eliminated the continuing violations doctrine and the trial court agreed that plaintiff may only recover damages for conduct that occurred within the six month statute of limitations period. Moreover, plaintiff's counsel conceded at oral argument that *Garg* applies to preclude recovery for conduct that occurred outside the six month statute of limitations period. Though plaintiff's counsel asserted in his brief in response to DaimlerChrysler's motion in limine that the continuing violations doctrine should apply, he changed his argument after DaimlerChrysler pressed the applicability of *Garg*.[3] Indeed, at the motion hearing, the following exchange occurred:

> *Trial Court*. And I certainly understand defendant's position in this case, but it seems to me that plaintiff is only seeking damages, can only seek damages for conduct that occurred in this case, within the 6 month period of the statute of limitations. It cannot obtain damages for acts that occurred prior to the 6 months.
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> *Plaintiff's Counsel*. That's correct.

Plaintiff's counsel agreed that *Garg* controls whether plaintiff may recover for untimely claims and "[a] party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal." *Grant v AAA Michigan/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006). Here, plaintiff did not argue that *Garg* should be applied prospectively only and plaintiff's counsel expressly agreed with the trial court that *Garg* applies and that plaintiff may not recover damages for conduct that fell outside the six month limitations period.[4] Accordingly, plaintiff may not claim error on appeal for the trial court's application of *Garg* during DaimlerChrysler's motion in limine.

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[3] Though plaintiff's appellate counsel asserts that DaimlerChrysler should have raised the issue of *Garg* earlier because the opinion was released on May 11, 2005, her trial counsel stated on the record that DaimlerChrysler's attorney sent him a copy of the *Garg* opinion on the day it was released.

[4] Indeed, the only argument plaintiff's counsel raised on this issue at the motion hearing was whether he may present untimely evidence as *background* information for the jury. The trial court granted counsel's request and the vast majority of evidence he presented on behalf of plaintiff occurred prior to the limitations cutoff date of April 17, 2002.

At the hearing on DaimlerChrysler's motion for directed verdict,[5] plaintiff's counsel declined to take the position that *Garg* is inapplicable, but instead argued that evidence established that sexual harassment and race association discrimination also occurred after limitations cutoff date. The flaw in plaintiff's argument is that, viewing the evidence in a light most favorable to plaintiff, plaintiff failed to present evidence that sexual harassment or race association discrimination occurred after April 17, 2002. Accordingly, the trial court correctly granted DaimlerChrysler's motion for directed verdict and dismissed plaintiff's sexual harassment and race association claims.

Affirmed.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray

[5] As this Court explained in *Dykema Gossett PLLC v Ajluni*, 273 Mich App 1, 11; 730 NW2d 29 (2006):

> This Court reviews de novo the grant or denial of a motion for a directed verdict. The trial court must consider the evidence in the light most favorable to the nonmoving party and make all reasonable inferences in favor of the nonmoving party; a directed verdict is proper only when no factual question exists upon which reasonable minds may differ.